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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. JERRY FLYNN WALKER, Appellee.	2 CA-CR 2011-0200 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20073435

Honorable Howard Fell, Judge Pro Tempore

REVERSED AND REMANDED

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H O W A R D, Chief Judge.

¶1 The state appeals from the trial court's order granting Jerry Walker's motion to vacate judgment based on the court's failure to instruct the jury on possession

of a narcotic drug as a lesser-included offense of sale of a narcotic drug. For the following reasons, we reverse and remand.

Factual and Procedural Background

¶2 The trial court is in the "best position" to evaluate the evidence when reviewing a motion pursuant to Rule 24.2, Ariz. R. Crim. P., *State v. Hickle*, 133 Ariz. 234, 237-38, 650 P.2d 1216, 1219-20 (1982), and it is entitled to "broad discretion," *State v. Jeffers*, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983). The evidence established that an officer, dressed in plain clothes, approached Mark McCain and asked to buy twenty dollars worth of crack cocaine. McCain approached Walker and then both men returned to the officer's car. Walker leaned into the car and asked the officer what he wanted. The officer replied that he wanted twenty dollars worth of cocaine, and Walker responded "sure." The officer saw Walker place something in McCain's left hand, and McCain then gave the officer a rock of crack cocaine from his left hand. The officer gave McCain twenty dollars and drove away. Other officers saw McCain toss another amount of a narcotic drug near a wall. Another officer arrested Walker and testified that he had found in Walker's pocket the twenty dollar bill the officer gave McCain in exchange for the crack cocaine.

¶3 Walker was indicted on one count of sale of a narcotic drug and one count of possession of a narcotic drug for sale. After a trial, the jury found him guilty on both counts. The court granted Walker's motion for a new trial on the count of possession of a narcotic drug for sale based on problems with the verdict forms. The trial court found Walker had historical prior convictions and had committed this offense while on parole.

It sentenced Walker to the presumptive term of 15.75 years in prison. Walker filed a motion to vacate judgment, arguing the court erred fundamentally by failing to instruct the jury sua sponte on the lesser-included offense of possession of a narcotic. The court granted his motion and vacated the judgment. The state appealed.

Discussion

¶4 The state argues the trial court erred by vacating the judgment because the jury could not reasonably have concluded that Walker "merely possessed a narcotic drug rather than selling it." We review a court's decision on a motion filed pursuant to Rule 24.2, Ariz. R. Crim. P., for an abuse of discretion. *See State v. Nordstrom*, 200 Ariz. 229, ¶ 90, 25 P.3d 717, 743 (2001). However, if the trial court commits an error of law, it has abused its discretion. *State v. Miller*, 226 Ariz. 202, ¶ 7, 245 P.3d 887, 891 (App. 2010).

¶5 Rule 24.2 permits a trial court to vacate a judgment if "the conviction was obtained in violation of the United States or Arizona Constitutions." We assume for purposes of this case that a conviction tainted by fundamental error in jury instructions would be a due process violation and therefore would violate the United States and Arizona constitutions. *See State v. Lucas*, 146 Ariz. 597, 604, 708 P.2d 81, 88 (1985) (court required to give instruction on lesser-included offense if failure "would fundamentally violate defendant's right to a fair trial" and "interfere[] with defendant's ability to conduct his defense"), *overruled in part on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

¶6 A defendant waives any objection to an instruction given by failing to object before the jury retires. Ariz. R. Crim. P. 21.3(c). However, a trial court's failure

to give a jury instruction sua sponte on a lesser-included offense may be fundamental error in some scenarios. *State v. Fiihr*, 221 Ariz. 135, ¶ 9, 211 P.3d 13, 15 (App. 2008). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶7 A defendant is entitled to a jury instruction on a lesser-included offense if the "'greater offense cannot be committed without necessarily committing the lesser offense,'" and the jury reasonably could find that the evidence supports only the lesser offense. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006), *quoting State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980). When a defendant presents an all-or-nothing defense, the evidence often will be insufficient to support an instruction on a lesser-included offense. *Id.* ¶ 29. However, such a defense does not preclude an instruction on a lesser-included offense if the evidence supports it. *Id.* ¶ 30. The evidence will not support an instruction if "'the jury might simply disbelieve the state's evidence on one element of the crime,'" but rather "must be such that a rational juror could conclude that the defendant committed only the lesser offense." *Id.* ¶ 18, *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984).

¶8 Both Walker and the state agree that possession of a narcotic drug is necessarily included in sale of a narcotic drug. *See In Re Pima Cnty. Juv. Action No.*

12744101, 187 Ariz. 100, 101, 927 P.2d 366, 367 (App. 1996). The indictment charged Walker with the "sale and/or transfer of a narcotic drug" under A.R.S. § 13-3408(A)(7). The jury instructions stated that sale of a narcotic required proof "the defendant knowingly sold and/or transferred a narcotic drug." It defined sale as "an exchange for anything of value" and transfer as "to furnish, deliver or give away." *See* A.R.S. § 13-3401(32), (37). The instructions also set forth the requirements for liability as an accomplice, including that a person, "with the intent to promote or facilitate the commission of an offense," "aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense."

¶9 The only evidence that Walker had possessed the crack cocaine was the testimony that, after being told the officer wanted crack cocaine and responding, "sure," Walker had placed something into McCain's left hand, and McCain then had transferred crack cocaine from his left hand to the officer. Thus, the only evidence of possession was not analytically severable from evidence that Walker was an accomplice to the sale. And Walker never challenged evidence that McCain had given the officer the cocaine. Instead, in closing argument Walker stated, "Who cares about McCain[?] We know McCain sold crack. We know that." Thus, if the jury concluded Walker had possessed the cocaine based on his having passed it to McCain, it could not have reasonably concluded Walker was not an accomplice to McCain's sale of the narcotic. *See Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150. The trial court abused its discretion by granting Walker's Rule 24.2 motion. *See Miller*, 226 Ariz. 202, ¶ 7, 245 P.3d at 891.

¶10 Walker contends that during the trial "significant testimony was elicited with respect to the buy money that was recovered and whether appellee was involved with the sale." However, the testimony he cites goes to his guilt of any offense and does not demonstrate that the jury could have found he merely had possessed, but had not aided in the sale of, the crack cocaine. And because the jury only was required to find Walker an accomplice to the sale of crack cocaine, any divergent testimony concerning the money and Walker's direct involvement in the sale or transfer portion of the transaction is irrelevant. Accordingly, Walker failed to carry his burden to show fundamental prejudicial error in the trial court. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Conclusion

¶11 For the foregoing reasons, we reverse the trial court's grant of Walker's motion to vacate judgment and remand for further proceedings consistent with this decision.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge